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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 134

GETTIG EQUIPMENT CORP., *et al.*,
Appellants,

vs.

BOARD OF ZONING APPEALS, *et al.*,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

MOTION OF APPELLEES TO DISMISS OR AFFIRM.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1416.

GETTIG EQUIPMENT CORP., *et al.*,

Appellants,

vs.

BOARD OF ZONING APPEALS, *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

MOTION OF APPELLEES TO DISMISS OR AFFIRM

SUPPLEMENTAL STATEMENT OF FACTS.

In the interest of brevity, we will only mention those additional facts as we deem necessary so that this Court may fully understand the case.

The Cleveland Transit System is a wholly owned utility of the City of Cleveland and is managed by five (5) transit board members, each of whom is appointed in a different year, by the Mayor for a five (5) year term. It has its own legal department, claims section, pays taxes to the City of Cleveland, and is generally operated independently of the City.

In September, 1965, the Cleveland Transit Board, being desirous of selling the property involved in this case, advertised and invited any interested persons to tender their offer for this property. *This invitation to the prospective bidders fully set forth how this particular parcel*

was zoned. The Appellants were the highest bidder and subsequently the property was sold to them on the 19th day of November, 1965.

Thereafter, on January 12, 1966, the Appellant was ordered by his former landlord to vacate his property by February 1, 1966, or pay a rental charge of One Hundred Dollars ($100.00) per day.

Without having obtained a permit as required by the City of Cleveland, they immediately moved their business to the property involved herein.

The Appellant, realizing they had no right to use the property as it was zoned for their operation, attempted in the first instance to have the property rezoned for semi-industrial use. Upon failing in this attempt, they appealed to the Cleveland Board of Zoning Appeals, seeking a variance. The Board, after four hearings, extending over a period of some four months, refused to grant a variance.

It should be noted by this Court that this parcel of land is surrounded on three sides by well maintained residential property and on the west side by a rather wide city street.

Their application for a permit requested permission for "retail and wholesale sales, service, leasing and fabricating of all kinds of vehicles." In particular, their operation consisted of assembling, repairing, storage and the sale of large twenty to forty foot trailers as used in tractor trailer rigs, some of which were badly damaged in highway accidents. There would also be some sales and storage of used tractors, all of this in an area surrounded on three sides by well maintained residences.

The property had been used continuously from 1907 for street car storage, service and turn-around and later for trackless trolleys. The City of Cleveland adopted their first Comprehensive Zoning Ordinance on November 5

1929. Since the use of the property by the Cleveland Electric Railway Company and thereafter by its successor, the Cleveland Transit System, existed continuously since 1907, they had established a non-conforming use and had a legal right to continue that use.

The testimony disclosed that this non-conforming use was continued until approximately June 15, 1963 and not until November 19, 1965 as claimed by the Appellant.

Furthermore, and contrary to the claims of the Appellant, Councilman Sanislo, Mr. Hlwak, Mrs. Virag and Mrs. Sopko, who were spokesmen for the area residents, testified that the operation by Gettig was more harmful, offensive and unsightly than the prior use.

In addition, Mr. Gettig, the president of the Appellant companies, stated that he knew prior to the bidding what the zoning was (4/18—p. 23), he was not misled by the Cleveland Transit System (4/18—p. 23), and further, that he was told that the Cleveland Transit System discontinued using the property two years prior to his purchase (4/18—pp. 24, 25).

Contrary to several statements made in Appellant's Jurisdictional Statement, there was substantial testimony indicating that the proposed use would be more harmful and a far greater non-conforming use than that which previously existed, see Memorandum of Opinion of the Court of Common Pleas as contained in Appellant's Brief, pages 27 and 28.

Furthermore, contrary to the italicized statement made on page 12 of the Appellant's Jurisdictional Statement, the property located west across East 93rd Street is zoned for semi-industrial use and not unrestricted industrial use.

ARGUMENT.

(1) Right of City to Dispose of Property.

The right of a municipality or a division thereof to sell or convey real property is given to such municipality by Article XVIII of the Constitution of the State of Ohio and has been so held by the Supreme Court of Ohio. *Babin v. City of Ashland*, 160 Ohio State Reports 328, 116 N.E. 2d 580, *State ex rel. Leach v. Redich*, 168 Ohio State Reports 543, 157 N.E. 2d 106.

(2) Police Powers.

Article XVIII, Section 3 of the Constitution of the State of Ohio gives the power to municipalities the right to adopt and enforce within their own corporate limits police regulations. The only limitation being that the exercise of that power by a municipality shall not conflict with the general laws of the State. *Greenberg v. Cleveland*, 98 Ohio State Reports 282, 120 N.E. 829; *Village of West Jefferson v. Robinson*, 1 Ohio State Reports 2d 113, 205 N.E. 2d 382.

The Supreme Court of Ohio in 1925 determined that zoning laws were a valid exercise of the police power. *Pritz v. Messer* (1925), 112 Ohio State Reports 628, 149 N.E. 30. Thereafter in the landmark case this Court upheld the constitutionality of Zoning, *Village of Euclid, et al v. Ambler Realty*, 47 S. Ct. 114, 272 U.S. 365, 71 L. Ed. 303, and further stated that regulations excluding businesses from residential areas are valid.

Since the property involved in this appeal is surrounded on three sides by well maintained residential property and on the fourth side by a wide city street, the desirability of keeping industrial uses from this area is obvious. Since this ordinance is clearly not arbitrary, a

Court will not substitute its judgment for that of a municipal legislative body. *Zahn v. Board of Public Works City of Los Angeles*, 47 S. Ct. 594, 274 U.S. 325, 71 L. Ed. 1074. Furthermore, this Court held in this latter case even though the property had a greater value for business purposes than it had as zoned for residential purposes, the ordinance was not clearly unreasonable.

(3) Due Process and Equal Protection

As admitted by Mr. Getty, president of Appellant companies, he purchased said property knowing what the zoning was, and he was not deceived in any way by the seller, the Cleveland Transit System. *After acquiring this property he was in no way deprived of any rights extended to each and every other property owner.* He first sought to have the property rezoned, a purely legislative function. Failing here he was permitted to appeal to the Board of Zoning Appeals in order to seek a variance. And finally he was afforded judicial review, both the Court of Common Pleas and the Court of Appeals have completely reviewed the record and found no error. The Supreme Court of Ohio refused to hear the matter, determining that no substantial constitutional question was involved.

Classification adopted by the State in the exercise of the police power which has a reasonable basis will be sustained against an attack based on the equal protection clause of the Fourteenth Amendment of the United States Constitution. *Cresent Cotton Oil Co. v. State of Mississippi*, 42 S. Ct. 42, 257 U.S. 129, 66 L. Ed. 166.

An owner of property is not denied equal protection because of nondiscrimination or classification between commercial and residential property. *Welch v. Swasey*, 29 S. Ct. 567, 214 U.S. 91, 53 L. Ed. 923.

Reasonable classification based on the police powers has been considered and upheld by this Court. *Northwest Laundry v. City of Des Moines*, 36 S. Ct. 206, 293 U.S. 486, 60 L. Ed. 396; *Zucht v. King*, 43 S. Ct. 24, 260 U.S. 174, 67 L. Ed. 194; *Gorub v. Fox*, 47 S. Ct. 675, 274 U.S. 603, 71 L. Ed. 1228.

While there is no set or exact definition of due process, which would encompass all situations, a general definition is set forth in 16 *Am. Jur.* 2d Constitutional Law § 546.

> "A genial law administered in its legal course according to the form of procedure suitable and proper to the nature of the case, conformable to the fundamental rules of right and affecting all persons alike, is due process of law."

Here the Appellant was treated in the same manner as any other property owner. He was not penalized because he purchased the property from a division of the City of Cleveland nor was he extended special rights and privileges.

CONCLUSION.

Having purchased this property knowing that it was surrounded on three sides by well maintained residences, knowing how it was zoned and admitting no deception was involved, the appellant thereafter was afforded the same rights as every other owner. The evidence clearly supported the decision of the Cleveland Board of Zoning Appeals and the Courts so found. Wherefore, we ask that this Court dismiss this action or affirm the decision of the lower courts.

Respectfully submitted,

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